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No. 93-1891

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. MICHAEL MACARIO, III,
Petitioner

v.

PRATT & WHITNEY CANADA, INC., et al.,
Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether review should be denied because the decisions below do not create any conflict between federal courts of appeal on the same or similar issues, do not conflict with decisions of this Court, and do not present any important questions of federal law to be resolved.

2. Whether review should be denied because the decisions below, which recognize the primary jurisdiction of the FAA to decide what modifications can be made to existing airplanes, are in accordance with established federal law and no question of federal preemption is presented.

3. Whether review should be denied because the sole remedy available to a litigant dissatisfied with an airworthiness directive or other order issued by the FAA is by appeal of that order pursuant to 49 U.S.C. App. § 1486(a); petitioner failed to pursue such an appeal and cannot collaterally attack the FAA airworthiness directive in this action.

4. Whether review should be denied because the *Noerr-Pennington* doctrine, extending First Amendment protection to Beech's successful petition to the FAA for an airworthiness directive, was properly applied under the circumstances in this case.

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BRIEF OF RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Beech Aircraft Corporation[1], respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions below are provided in the Appendix to Petition for Writ of Certiorari ("P-App.").

1. Beech Aircraft Corporation is a wholly owned subsidiary of Raytheon Corporation, a publicly owned corporation.

JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is evoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE PETITION FOR WRIT OF CERTIORARI

Section 1486 of the Federal Aviation Act, 49 U.S.C. App. § 1486.[2]

COUNTERSTATEMENT OF THE CASE

Factual Background

Beech Aircraft Corporation ("Beech") was sued because it exercised its constitutional right to petition the government for favorable action. To protect the owners of more than 4,000 Beech King Air airplanes and their passengers from being exposed to serious injury or

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2. 49 U.S.C. App. § 1486 provides, in pertinent part:

(a) **Orders subject to review; petition for review.** Any order, affirmative or negative, issued by the Board or Administrator [Secretary of Transportation] under this Act, except any order in respect to any foreign air carrier subject to the approval of the President as provided in section 801 of this Act shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

• • •

(d) **Power of court.** Upon transmittal of the petition to the Board or Administrator [Secretary of Transportation], the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator [Secretary of Transportation]. Upon good cause shown and after reasonable notice to the Board or Administrator [Secretary of Transportation], interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

death, and to protect itself from legal liability, Beech caused the Federal Aviation Administration ("FAA") to investigate the safety of the reissuance by Pratt & Whitney Canada, Inc. ("PWC") of a PWC Service Bulletin ("SB 1330"). Pursuant to SB 1330, PWC, as the engine manufacturer, would have urged owners of Beech King Airs equipped with PWC small gas turbine engines to install filters ("P3 filters") in the air lines which by pneumatic force control the rate at which fuel is delivered to the two turboprop PWC engines ("P3 lines").

It was in 1989 that PWC, an engine manufacturer, agreed to reissue SB 1330 pursuant to PWC's settlement of a claim which T. Michael Macario ("Macario") had asserted on behalf of the estate and heirs of a pilot killed in a King Air accident. (The original personal injury action is hereafter referred to as "*Macario I*.") However, the uncontradicted evidence in the district court established that Beech was not a party to the suit which PWC settled with Macario in 1989; had not been aware of, or participated in any way, in PWC's negotiations to settle that suit, and did not learn of the terms of that settlement until after the settlement was concluded.[3]

Beech engineers and test pilots had learned from performing flight tests in 1981 for the certification of one of the King Air models affected by SB 1330, that equipping King Airs powered by small turbine engines with these filters involved a risk to flight safety.[4] Beech

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3. While Macario had sued Beech in a companion action, that action was settled as to Beech before the first trial of *Macario I*, which ended in a hung jury as to the liability, if any, of PWC. It was during jury deliberations at the second trial of *Macario I* that PWC and Macario entered into the settlement agreement involved.

4. With the filters installed, the engines accelerated too slowly for the airplane to meet FAA requirements for balked landing performance, i.e., a maneuver in which the pilot must abort his landing and apply full power to the engines to execute a "go-around." If the delay in engine acceleration occurred 200 feet over a runway, it would be extremely difficult for a pilot of ordinary skill to regain full power before the airplane would impact the runway.

had also determined in 1981 that this risk was so substantial as to cause Beech to have that model King Air certificated for manufacture and operation without having such filters installed. The other model King Airs affected by SB 1330 had also been certificated by Beech without having P3 filters installed. Furthermore, neither Beech nor FAA records, over the course of more than twenty years, had recorded any King Air accidents attributable to the absence of P3 filters. On the other hand, as the FAA subsequently confirmed, there are FAA records which establish that build ups of contaminants in such filters do adversely affect the operation of the engines.

As soon as Beech learned what PWC proposed to do about reissuing SB 1330, Beech brought this existing information to the attention of the FAA. Beech requested that the FAA conduct an investigation to determine whether or not the installation of those filters would in fact create a risk to flight safety in the various Beech aircraft models involved.[5]

The FAA met with Beech and PWC, reviewed the documented basis for Beech's concerns, and determined that PWC had issued SB 1330 in its original form without consulting Beech or performing flight tests to determine the effect of the installation of such filters on the King Air models involved. Then, the FAA, and later its Canadian counterpart, acting at the instance of Beech alone, stayed PWC's reissuance of SB 1330 pending the FAA's completion of an investigation of the possible flight safety risks involved.

While that investigation was in progress, Macario's counsel instituted the present proceeding. PWC was

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5. The foregoing is what the documentary record clearly establishes was Beech's initial request of the FAA; there is no evidence whatsoever that Beech's original intention was, as alleged by Petitioner (Petition, at p. 10, fn. 3), "to make certain that the service bulletin was never [re]issued."

sued for breach of contract, Beech for tortious interference with contract, and both PWC and Beech on a multitude of other theories, most notably "civil conspiracy" and "concerted tortious action." The object of the suit was to force PWC to reissue SB 1330 in its original form, but on an "urgent compliance" basis, and to punish Beech for allegedly interfering improperly with Macario's settlement with PWC.[6]

The FAA continued its investigation, closely monitored and (through its own test pilot) actually participated in Beech flight tests which confirmed the existence of the potential safety of flight problem reported initially by Beech.

Not until FAA investigators had determined for themselves the validity of Beech's concerns, and its staff had decided to recommend issuance of the Airworthiness Directive ultimately issued, did PWC corroborate or support Beech's expressions of concern. Only after PWC engineering representatives met with Beech engineers at the FAA's direction to clarify their apparent differences, did PWC acknowledge the validity of Beech's concern.

Ultimately, after considering as well test data, letters and affidavits from experts who expressed contrary opinions submitted by Macario's counsel, the FAA caused PWC to limit the application of the reissued SB 1330 to only two King Air models.[7] The FAA issued an

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6. Although Macario contends (Petition, at p. 3) that the motivation for the alleged conspiracy was to avoid the "preclusive effect" that a verdict in *Macario I* would have in the *Sunbird* litigation, Macario ignores the fact that a verdict adverse to PWC in the *Macario I* case would not have been binding on Beech in *Sunbird* because Beech was not a party to *Macario I* nor otherwise a privy to its disposition. Moreover as to Macario's contention (Petition, at p. 5) that Beech had a "substantial financial exposure" in the *Sunbird* litigation, that litigation was resolved, and not as a class action, with no payment whatever by Beech.

7. The Beech King Air models F90 and A100 (the airplane piloted by Macario had been an A100) were not included by the FAA because those airplanes were certified for flight with engine ground

Airworthiness Directive[8] which required owners of all of the other King Air models affected by SB 1330 in its original form to remove any filters which might have been installed pursuant to the original, entirely optional, bulletin.[9]

The FAA took this action because it determined that an unsafe condition existed. The installation of P3 filters did cause excessive engine acceleration times which could result in the inability of a pilot to safely perform the balked landing maneuver, i.e., where the pilot must abort the landing, accelerate the engines to full power and execute a "go-around." The FAA specifically considered and rejected each and every contention of Macario's counsel and his experts. The FAA found that Beech's flight tests, conducted at the FAA's request, were properly conducted in a conservative manner to determine the "worst case" effect that a P3 filter would have. The FAA also found that flight tests conducted by Macario's counsel and his experts without FAA supervision or participation were invalid and that the tests were

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idle speeds set at 62% or higher because of their specific propeller installations (four bladed propellers, rather than three bladed propellers as on the other models).

8. The Airworthiness Directive AD 92-15-11, Docket No. 91-ANE-06, was published in the Federal Register on July 17, 1992. 57 Fed. Reg. 31654. A copy of the Airworthiness Directive and the Supplementary Information published with it are set forth as Appendix A to this Brief ("R-App. A").

9. Although Macario states (Petition, at p. 4) that the Notice of Proposed Rulemaking, published by the FAA proposing the Airworthiness Directive, did not include airplanes of other manufacturers equipped with PWC engines, Macario neglects to inform the Court that in the Supplementary Information published in the Federal Register with the final Airworthiness Directive, the FAA stated that the FAA agreed that other model airplanes were potentially affected and identified one additional model series of another manufacturer that was directly affected. The FAA further stated that it was evaluating flight test results and that additional rulemaking might follow. (R-App. A-5)

conducted improperly, without known fuel control calibration, and with poor control over the test conditions.[10]

Macario failed to exercise his exclusive remedy to seek review of the FAA's action by petitioning the court of appeals as provided by § 1486(a) of the Federal Aviation Act, 49 U.S.C. App. § 1486(a). Thereafter, the district court entered summary judgment in favor of Beech.

The Decisions of the District Court and the Court of Appeals

Beech's motion for summary judgment was based on a detailed deposition and documentary record with respect to the 1981 Beech flight tests and their results; detailed correspondence with and from the FAA regarding the reissuance of SB 1330; deposition testimony and records of the 1990 Beech flight tests conducted with the FAA as part of the FAA's investigation; deposition excerpts from the FAA witnesses as to the reasons for the FAA's actions, the validity of the Beech flight test parameters and data and the invalidity of experimental flight test data submitted by Macario's counsel here; deposition excerpts from PWC's personnel and its counsel regarding the settlement establishing that Beech was not consulted by PWC before or during the settlement negotiations with Macario, and affidavits from Beech's counsel establishing that Beech was not even aware of the settlement until after it occurred.[11]

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10. Macario contends (Petition, at p. 5) that the engine fuel control settings used by Beech would make the engine uncertifiable. However, the FAA also determined that Beech's use of a ground or in-flight idle of 51% was approved in accordance with the limitations imposed by the engine manufacturer, PWC. (R-App. A-5)

11. Contrary to Macario's assertion (Petition, at p. 10, fn. 3), it was Beech who provided the district court with documentary evidence of Beech's contacts with the FAA regarding the proposed reissuance of SB 1330.

The very experienced district judge did not grant summary judgment in favor of Beech and PWC until he had reviewed the lengthy briefs, the detailed documentary record and listened to oral arguments with respect to the alleged merits of Macario's multifarious contentions. In fact, at oral argument, the district judge asked Macario's counsel to submit evidence establishing the existence of any conspiracy between Beech and PWC (P-App. A-14), and granted him additional time for such a submission. Macario failed to produce any such evidence and the district court properly granted summary judgment on Macario's civil conspiracy and concerted action claims (P-App. A-14).

As to Macario's claim for fraud in the inducement, the district court properly found that, once again, Macario had failed to produce evidence that Beech had influenced PWC in negotiating the terms of the settlement agreement (P-App. A-17).

As to Macario's claim that Beech tortiously interfered with Macario's contractual relationship with PWC, the district court concluded that Beech did no more than exercise its constitutional right to petition the government (i.e., the FAA) and, thus, Beech's actions were protected under the *Noerr-Pennington* doctrine and could not be the basis for tort liability (P-App. A-12).

As to Macario's claim for unjust enrichment, the district court properly held that that doctrine did not apply where the relationship between the parties (Macario and PWC) was founded on a written agreement or express contract (P-App. A-15).

As to Macario's claim for misappropriation of a property right, the district court properly held that any right which Macario might otherwise have had to the reissuance of SB 1330 was subject to the power of the FAA to authorize or prohibit such action, and that because the FAA had determined that SB 1330 should not be issued in its original form, Macario had no property right in SB 1330 (P-App. A-13).

The court of appeals affirmed the district court's decision, holding that:

> We have carefully considered all of the issues and arguments raised by Macario, and we find that the district court's judgment is correct in all respects.

(P-App. A-4).[12]

REASONS FOR DENYING THE WRIT

Rule 10 of this Court provides:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for Writ of Certiorari will be granted only when there are special and important reasons therefor.

The Rule goes on to describe "the character of the reasons" the Court will consider in passing on a Petition for Certiorari, such as: (1) conflicts between federal courts of appeal on the same issue; (2) wide departures by a federal court of appeals from the "accepted and usual course of judicial proceedings"; and (3) a decision by a federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court, or which "has decided a federal question in a way in conflict with applicable decisions of this Court."

When measured by the foregoing standards, the defects of the present Petition are both clear and fatal. The decisions below do not conflict with any decisions of this Court, do not create any conflict between courts of appeal on the same or similar issues, and do not present any important questions of federal law to be resolved by this Court.

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12. Contrary to Macario's contentions (Petition, at p. 6), the court of appeals did not base its affirmance of the summary judgment in favor of Beech on plaintiff's civil conspiracy and tort of concerted action counts solely on first amendment grounds. The court also concluded that ". . . the district court properly determined that insufficient evidence exists in the record to establish a genuine issue of material fact concerning wrongful activity on the part of Pratt or Beech." (P-App. A-3).

I. Summary Judgment Was Properly Entered And Affirmed In Accordance With The Applicable Decisions Of This Court.

The district court properly set forth the applicable standards for deciding a motion for summary judgment, (P-App. A-6-7) citing this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). More specifically, the district court held:

> Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and ' "cannot simply reassert factually unsupported allegations contained in its pleading.' " *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citing *Anderson*, 477 U.S. at 249, 325).

(P-App. A-7).

Despite Macario's protestations to the contrary, that is exactly what he attempted to do in this case. Macario failed to produce any evidence contradicting the deposition testimony and the affidavits submitted by Beech which conclusively established that Beech was not consulted about and had no knowledge of the *Macario I* settlement. Macario also failed to produce any evidence of a conspiracy or concerted action by PWC and Beech.

Neither the district court nor the court of appeals decided any issues of fact in granting summary judgment in favor of Beech. The FAA determined that P3 filters should not be installed on certain Beech King Airs, and Macario never challenged the FAA's action. The Airworthiness Directive established that Beech had done nothing more than lawfully exercise its constitutional right to be heard on an issue of obvious concern for the welfare of Beech and its customers.

Macario contends (Petition, at p. 8) that PWC could have taken action to allow the Airworthiness Directive to be amended to include the filter, and Macario also

claims (Petition, at p. 10) that Beech did not submit any affidavits from its engineers or test pilots regarding the alleged actions that PWC could have taken to obtain an amendment of the Airworthiness Directive from the FAA.[13] Such arguments are specious. Beech objected to SB 1330 as originally proposed, not after some potential future modifications to the PWC engines or Beech King Airs. The salient fact is that the FAA issued an Airworthiness Directive requiring the removal of P3 filters on those Beech King Airs covered by the Airworthiness Directive.

Macario contends that review by the Court is necessary to resolve questions left open by *Anderson* and cites the dissenting opinions of Justices Brennan and Renquist. However, the present case does not involve any complicated evidentiary standards nor does it present any difficulty in applying the Court's decision in *Anderson* to the facts of this case. Here, quite simply, Macario failed to produce any evidence of fraud, conspiracy or concerted action on the part of Beech.

Celotex Corp. v. Catrett, *supra*, does not support Macario's position. There, this Court held that F.R.C.P. 56 does not require the moving party to support its motion for summary judgment with affidavits or other similar materials "negating the opponent's claim."

Finally, Macario argues (Petition, at p. 11) that the court of appeals "abdicated its duty of responsible appellate review," contending that the court of appeals granted some "deference" to the district court's decision granting summary judgment. The court of appeals' opinion states that the court carefully considered all of

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13. Macario fails to consider the fact that any change in the flight idle of the King Air airplanes would require extensive flight testing and modification of other significant flight limitations, including stall speed. Such a change would also require a re-certification by the FAA, and, in certain significant respects, the issuance of new flight instructions to the owners of more than 4,000 existing aircraft. The FAA has concluded that no justification exists for requiring such changes.

the issues and arguments raised by Macario. There is no indication that the court of appeals did not apply the correct standard of review, i.e., a plenary review. Macario's reliance on *Salve Regina College v. Russell*, 499 U.S. 225 (1991) is misplaced. There, the Court held that the court of appeals committed reversible error when it applied "appellate deference" to an interpretation of state law made by the district judge sitting in that state, and that a court of appeals must review a district court's determination of state law *de novo*.

Here, no deference to the decision of the district court as such was extended. Summary judgment was properly entered by the district court and affirmed by the court of appeals in accordance with the prior decisions of this Court.

II. The Decisions Below Which Recognize The Primary Jurisdiction Of The FAA Are In Accordance With Established Federal Law And No Question Of Federal Preemption Is Presented.

Neither the district court nor the court of appeals held that Macario's claims were preempted by federal law. Their decisions do not even mention federal preemption. The district court did recognize the doctrine of primary jurisdiction, holding that "[w]hile the court is proficient in many areas, it preserves matters of safety in aviation to the expertise of the FAA" (P-App. A-8).

Primary jurisdiction applies whenever enforcement of a claim involves the resolution of technical issues which have been committed by Congress to the expertise of a regulatory body. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). In *Far East Conference v. United States*, 342 U.S. 570 (1952), this Court stated, it is:

> . . . now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for

> regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.

Id. at 574.

Here, the district court properly concluded that the FAA should first decide the technical safety issues involved in the application of P3 filters.[14] The FAA did so and issued its Airworthiness Directive. An airworthiness directive has the force of law. *Crigler v. Cessna Aircraft Co.*, 830 F.2d 169 (11th Cir. 1987). Once the Airworthiness Directive was issued, the courts below properly held that the Airworthiness Directive established PWC's state law affirmative defenses to Macario's contract claim, and established that Macario had no property interest in the reissuance of SB 1330.

Neither the district court nor the court of appeals held that the Macario's claims were preempted by federal law. Accordingly, there are no conflicts with decisions by other federal courts of appeal on the issue of

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14. The Federal Aviation Act, 49 U.S.C. § 1421(a), directs the FAA to establish minimum safety standards governing, among other things, the design of aircraft engines, and to certify the types of engines that meet those requirements. The FAA has carried out its mandate by enacting regulations which set forth the process for obtaining safety certifications, the standards that must be met by aircraft and aircraft engines before they can be mass produced, and procedures for testing and design review to ensure regulatory compliance. 14 C.F.R. Parts 21, 22 and 33.

The FAA is authorized to promulgate new standards for existing aircraft and to issue Airworthiness Directives requiring design changes in the interest of safety, if it finds:

(a) an unsafe condition exists in a product; and

(b) that condition is likely to exist or develop in other products of the same type design. 14 C.F.R. § 39.1.

If the FAA finds such unsafe condition, it is authorized, and has the discretion to

> prescribe inspections and the conditions and limitations, if any, under which those products may continue to be operated. 14 C.F.R. § 39.11.

federal preemption, and no important question of federal law to be resolved by this Court.

III. Macario Failed To Appeal The FAA's Order And Cannot Collaterally Attack The Airworthiness Directive.

In essence, Macario is attempting to collaterally attack the FAA's decision.[15] It is well settled that collateral attacks upon administrative orders are impermissible. *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, (1938); *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981); *Whitney National Bank v. Bank of New Orleans and Trust Co.*, 379 U.S. 411, 421-422 (1965); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir.), *cert. denied*, 464 U.S. 978 (1983).

Congress has provided a statutory procedure for review of FAA orders. 49 U.S.C. App. § 1486(a). A party aggrieved by an order of the FAA may file a petition for review in the courts of appeal. *Id.* That procedure is the exclusive remedy for a party dissatisfied with an FAA order. 49 U.S.C. App. § 1486(d). *Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir.), *cert. denied*, 464 U.S. 978 (1983); *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017 (9th Cir. 1980); *Oling v. Airline Pilots Association*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965); *U.S. v. Hayes*, 264 F.2d 1929 (2d Cir. 1959).

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15. Macario contends that the information provided to the FAA was false (Petition, at p. 17), that the FAA ignored comments against the regulation (*Id.*), that the regulatory process was orchestrated by litigation counsel for the respondents (*Id.*), that the Airworthiness Directive should be amended to include P3 filters (Petition, at p. 10), and that the engine fuel control settings for the Beech flight tests were improper (Petition, at p. 5).

Here, Macario failed to exercise his rights under § 1486(a) of the Federal Aviation Act. Certainly, therefore, Macario should not be permitted to attack the FAA's decision collaterally in this proceeding.

IV. The *Noerr-Pennington* Doctrine Was Properly Applied In This Action, And There Is No Uncertainty Regarding Its Application Which Would Justify The Granting Of The Writ.

Macario does not contend that the *Noerr-Pennington* doctrine should be limited solely to antitrust cases. Rather, Macario contends that if the *Noerr-Pennington* doctrine applies in non-antitrust cases, the Court should grant certiorari to affirmatively "answer this question" and to determine the scope of the sham exception. This Court has already done so.

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court considered the applicability of the *Noerr-Pennington* doctrine outside the context of an antitrust action. There, white merchants who had allegedly been damaged as a result of a civil rights boycott brought actions against the participants in the boycott and the N.A.A.C.P. The Mississippi state court granted injunctive relief and awarded damages. The participants in the boycott appealed. This Court held that boycott activity which was not in and of itself violent was constitutionally protected under the First Amendment because it involved the rights of speech, assembly, association and petition. This Court specifically stated that, "*** it is not disputed that a major purpose of the boycott in this case was to influence government action." 458 U.S. at 914. The Court went on to hold that individuals who participated in the boycott, but who did not participate in violent activity, or did not ratify such violent activity, could not be held liable in damages.

Significantly, too, in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, ____ U.S. ____, 113 S. Ct. 1920 (1993), this Court stated:

> Whether applying *Noerr* as an antitrust doctrine or *invoking it in other contexts* we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. [Emphasis supplied]

Id. at 1927.

Moreover, the Court, in deciding cases under the *Noerr-Pennington* doctrine, has never held that the First Amendment right to petition the government only applies in antitrust cases. On the other hand, courts of appeals have consistently applied the *Noerr-Pennington* doctrine in non antitrust cases. *See, e.g., Brownsville Golden Age Nursing Home v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (civil conspiracy and tortious interference with business relations); *Gorman Towers, Inc. v. Bogoslavisky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (civil conspiracy).

Contrary to Macario's assertion, there is no need for this Court to grant the Writ to determine the scope of the sham exception to *Noerr-Pennington*. That issue, too, was adequately addressed by the Court in recent decisions. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, ____U.S. ____, 113 S. Ct. 1920, 1928 (1993); *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

In *Real Estate Investors, supra*, this Court adopted a two-part definition of the sham exception to the *Noerr-Pennington* doctrine. First, a court must determine whether the lawsuit (the challenged activity in the case) was "objectively baseless" in the sense that no reasonable litigant could realistically expect success on the merits. If the challenged activity was objectively baseless, then the court must examine the litigant's subjective motivation. In a footnote, the Court clarified its definition with the following: "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." 113 S. Ct. at 1928, fn. 4.

This Court has consistently stated that communications that are successful in influencing the government are not a sham. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 144 (1961) (taking the facts alleged in the complaint as true, defendants' "effort was not only genuine but also highly successful"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988) ("a successful effort to influence government action . . . certainly cannot be characterized as a sham."). Here, Beech was, in fact, successful in petitioning the FAA, as evidenced by the issuance of the Airworthiness Directive. Accordingly, neither the district court nor the court of appeals could have found that Beech's activity in petitioning the FAA was a sham.

In *Columbia v. Omni International Advertising, Inc.*, 499 U.S. 365 (1991) also cited by Macario (Petition, at p. 17), this Court considered the sham exception to the *Noerr-Pennington* doctrine. There, this Court held that the sham exception to the *Noerr-Pennington* doctrine did not apply to the defendant's successful effort to induce the local government co-defendant to enact an ordinance restricting the size, location and spacing of billboards which severely limited the plaintiff's ability to compete in the market. Specifically, this Court held that *Noerr* protects a party's effort to influence public officials regardless of intent or purpose.

Macario's assertion (Petition, at p. 17) that he produced evidence "from which the jury could infer that the use of the process itself rather than the outcome, which was the liability-producing conduct," is devoid of any factual support in the record.

Macario's broad, superficial and conclusory statement that he "established" that Beech provided false information to the FAA (Petition, at p. 17) is not sufficient to overcome Beech's First Amendment rights.[16]

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16. In *Noerr*, *supra*, this Court held that even though the defendants, and to some degree the plaintiffs themselves, in their

Moreover, the FAA carefully considered the numerous submissions by Macario's counsel and his experts and determined that the Airworthiness Directive should be issued. Macario never challenged the FAA's decision. Purely and simply, the FAA's favorable response to Beech's expressions of concern establishes as a matter of law that Beech's concerns were bona fide and not a sham. Macario seeks to impose liability on Beech because Beech expressed flight safety concerns to the FAA, which the FAA has determined to be valid. A clearer attempt to limit a party's constitutional right to "petition the government" is difficult to imagine.

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advertising campaigns had "deliberately deceived the public and public officials . . . that deception, reprehensible as it is, can be of no consequence as far as the Sherman Act is concerned." 365 U.S. at 145.

CONCLUSION

The essence of Macario's complaint is that he has not been able to force PWC to reissue original SB 1330. The FAA is the agency charged by Congress with deciding what modifications may safely be made to existing airplanes and given primary jurisdiction over such issues. The FAA has found that the installation of P3 filters creates a substantial flight safety risk and determined that SB 1330 should not be issued. Macario never appealed the FAA's decision and cannot attack it here. The district court and the court of appeals have already decided that Macario is not entitled to any relief. This case does not present any significant question of federal law and does not deserve the attention of this Court.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RULES AND REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

(Docket No. 91-ANE-06;
Amendment 39-8305, AD 92-15-11)

Airworthiness Directives: PRATT & WHITNEY
Canada PT6A Series
Turboprop Engines

Friday, July 17, 1992

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Pratt & Whitney Canada (PWC) PT6A series turboprop engines, that requires removal of the compressor delivery air line (P3) filter assembly. This amendment is prompted by aircraft flight test results that have revealed an engine configuration and a set of operating conditions where engine acceleration is insufficient to provide for required aircraft balked landing performance. The actions specified by this AD are intended to prevent excessive engine acceleration time that could result in an aircraft's inability to safety perform the required balked landing maneuver.

EFFECTIVE DATE: August 17, 1992.

ADDRESSES: The service information referenced in this AD may be obtained from Pratt & Whitney Canada, Technical Publications Department, 1000 Marie Victorin, Longueuil, Quebec J4G 1A1. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, room 311, 12 New England Executive Park, Burlington, Massachusetts.

FOR FURTHER INFORMATION CONTACT: Robert E. Guyotte, Manager, Engine Certification Branch, ANE-142, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803-5299; telephone (617) 273-7080; fax (617) 270-2412.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain Pratt & Whitney Canada (PWC) PT6A series turboprop engines was published in the Federal Register on March 1, 1991 (56 FR 8733). That action proposed to require inspection for and removal of the compressor delivery air line (P3) filter assembly.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments contained in 23 comment letters received. All of the comments received are addressed in the following paragraphs.

Three comments reference the content of the Notice of proposed rulemaking (NPRM). One commenter states that too little technical information was provided to evaluate the merit of the proposed AD. The FAA disagrees. The detail of technical content in the Notice of proposed rulemaking (NPRM) is in accordance with prescribed FAA practices. Several comments contain detailed technical discussions relative to information contained in the NPRM. Therefore the FAA believes the NPRM adequately described the proposed action.

Two commenters state that the comment period was too short, and object to the FAA's denial of a request for an extension. The FAA disagrees. The NPRM 45 day comment period is in accordance with established FAA practices. Also, none of the comments provided justification to support the request. A number of comments

were received after the comment period closing, and were considered in the decision making process.

One comenter also states that the NPRM was inadequately advertised. The FAA disagrees. Publication in the Federal Register is the official method by which proposed AD's are made known to the public.

Several comments address the service history of affected PWC PT6A engines, and question whether the data demonstrates a need for installation of P3 filters to prevent fuel control unit (FCU) pneumatic contamination. The FAA has reviewed available sources of information, and can find no pattern of engine failures or power losses in service due to FCU pneumatic contamination. In addition, Transport Canada, the responsible airworthiness authority, has reviewed their own service difficulty data base, and that of PWC, and cannot identify a service problem pattern relating to FCU pneumatic contamination. Lastly, the FAA has no information relative to any National Transportation Safety Board (NTSB) probable cause findings related to engine failures or power losses associated with FCU pneumatic contamination. The P3 filter option offered by PWC is intended for operations in harsh environments as a method for extending useful FCU installed life. However, FCU failure modes and effects due to pneumatic contamination are identical with or without P3 filter installation. One commenter describes one such harsh environment, noting FCU problems when operating in an area where pollutant particles from paper processing mills were discharged into the atmosphere. While the FAA concurs that a P3 filter could be useful when operating in such an environment, another commenter points out that service difficulty reports describe slow or no accelerations with clogged P3 filters.

Two commenters state that certain tests have shown a definitive need to install P3 filters. The FAA has no information of any of these tests, and none were submitted. As discussed above, existing service difficulty data

does not support the conclusions stated in the comments. One commenter states that a "roll-back" or power loss event can result in a high propeller drag condition, leading to an accident. The FAA disagrees. An engine power loss due to FCU pneumatic contamination is no more severe than any single engine power loss for any other reason. The affected airplanes are all twin-engine airplanes, and must meet all applicable Civil Aviation Regulations (CAR) or Federal Aviation Regulations (FAR) requirements for single engine operation.

Two comments address the U.S. Navy's use of Beech Aircraft Company (BAC) T-34C (PWC PT6A powered) airplanes. The two comments state that the Navy had engine power loss problems related solely to the lack of P3 filters in BAC T-34C airplanes, and therefore P3 filters must be necessary. The FAA disagrees. The FAA does not have direct access to the Navy's service difficulty database, however, the FAA has identified nine BAC and PWC field service documents that pertain to a BAC T-34C power loss problem. Of this group, one action to address this problem was to install a P3 filter. Further research has shown that the most dramatic improvement to the BAC T-34C engine power loss problem was made by adjusting the torque controller setting, not installation of a P3 filter. The incorporation of these nine service documents, together, coincides with the apparent reduction in the BAC T-34C engine power loss problems.

Also, it is significant that the BAC T-34C idle is 62% to 65% core speed (Mg), while the idle of the affected airplanes is only in the 51% Ng range. Therefore, no engine acceleration problems associated with P3 filter installation would be expected on these higher idle installations. Lastly, there is little comparison of mission or operating environment between a single engine military trainer (T-34C), and a twin engine business type airplane. Therefore, the FAA has determined that the noted BAC T-34C service history is not relevant to this issue.

One commenter states that PWC issuance of a service bulletin offering the P3 filter as an option is sufficient evidence of the necessity of installing the filter. The FAA disagrees. As discussed previously, the FAA has determined that the service history data base does not indicate the need to require P3 filter installation. Also, PWC's publication of an optional service bulletin does not mean that operation of a PT6A engine without a P3 filter is unsafe.

Two comments address the airplane applicability of this AD. The comments question why other airplane types powered by affected PWC PT6A engines were not included in the AD action. The FAA agrees that other model airplanes are potentially affected, and has reviewed with appropriate airplane manufacturers the possible effects of P3 filter installation. At this time, the FAA has identified one additional model series (Cessna 406) that is directly affected. Flight tests similar to the final phase BAC tests have been completed on this model, yielding similar results of slow engine acceleration, and concurrent airplane handling difficulty during balked landing maneuvers. Corrective action for this model series airplane is being evaluated and additional rulemaking may follow.

Several comments address the controlling test parameters used during the final phase of the Beech test program, specifically idle Ng values and generator load factor. In particular, several comments question the use of 51% idle Ng inflight as not being an approved value. The FAA disagrees. The FAA has reviewed BAC and PWC service documents (i.e., the Airplane Flight Manual (AFM) and Engine Installation Manual), and has determined that a ground or inflight idle Ng of 51% is approved in accordance with both manufacturers' limitations. Comments also state that the BAC King Air Model C90 AFM, Limitations Section, prohibits the use of generator load factor greater than 50% with an idle Ng below 57%. The FAA disagrees. The FAA has

reviewed the AFM, and has determined that the Emergency Procedures Section instructions can allow, under certain circumstances, a maximum generator load factor while the engine is operated at low idle (51% Ng) during approach and landing. It has also been determined that the Ng/generator load limits address a generator cooling requirement as opposed to an engine operating concern, and that such a limit is actually not required on C90 aircraft. Also, the use of maximum generator load at 51% Ng is allowed by PWC limitations. Also, several comments state that the BAC fuel control adjustments were improper, exceeded approved limits, and were inappropriate for field service. The FAA disagrees. The FAA has reviewed the final phase BAC test FCU calibrations, and compared them to approved type design limits. All values (i.e., Ng, acceleration fuel flow, etc.) have been found to be within approved type data limits. As to the appropriateness of the calibrations, the FAA believes that test calibrations represent a worst case approved configuration relative to engine acceleration. The fact that the FCU calibrations are not typical of in-service units does not affect the appropriateness of the worst case test configuration.

One commenter states that the BAC C90 AFM Limits Section "Minimum Ng vs. Generator Load" table is not related to starter-generator cooling requirements, but more closely related to engine operational considerations. The FAA disagrees. The noted limit table has been confirmed by BAC to be related to hot day (125 degrees F) starter-generator cooling. Increased engine speeds increase the cooling air flow in order to keep the starter-generator within its component temperature limit. It must also be noted that the final phase BAC C90 tests were conducted within the horsepower and bleed extraction limits noted in the applicable PWC PT6A Installation Manual.

Several comments address inflight idle Ng, and whether a particular Ng value on the ground can be maintained during the subject flight conditions, and

whether this value can change from flight-to-flight. The FAA has reviewed the PWC PT6A control system design, and has determined that the idle Ng value on the ground will be maintained −1% inflight, up to the altitude (barometric pressure) where decreasing idle fuel flow equals the FCU mechanical stop minimum fuel flow. This is due to the FCU scheduling to maintain a specific Ng value within the range of its authority over low end fuel flow. Above that altitude, the previously constant (−1%) idle Ng becomes a variable, increasing with altitude. It is possible to reduce this idle Ng value with horsepower or bleed extraction, if the demand is beyond the range of FCU authority. In support of this review, the FAA has conducted several independent flight tests that verified the expected idle Ng profile with altitude. The FAA flight tests also verified that there were no significant flight-to-flight variations in the idle Ng values. It should also be noted that during the final phase BAC tests, idle Ng was never artificially adjusted to a lower value, either on the ground or inflight. One commenter also suggests that a typical in-service airplane (nominal FCU calibration) would be more representative for engine acceleration testing. The FAA disagrees, and believes the configuration tested in the last phase of the Beech program is a proper worst case configuration relative to approved type design data.

Four commenters state that the BAC test results were erroneous and invalid due to not meeting type design requirements. The FAA disagrees. The FAA has closely reviewed the airplane configuration tested in the final phase of BAC testing, and closely reviewed the demonstrated test conditions. The FAA has determined that the airplane configuration and test parameters meet type design data. The test configuration and test parameters represent a worst case relative to engine acceleration performance, and airplane balked landing performance.

Several comments address the final phase of BAC tests, specifically the flight test on August 17, 1990. One

commenter states that the FAA observer log of engine acceleration time data did not agree with the BAC log. The FAA disagrees. The FAA has reviewed the logs for the last flight test on August 17, 1990, and finds that the two logs contain equivalent data. Also, the commenter identifies the August 17, 1990, test as BAC Flight No. 18, which is incorrect. The August 17, 1990, test is identified as BAC Flight No. 19. The BAC test report contains log sheets for both tests. BAC Flight No. 18 was flown on August 16, 1990. The noted test points were timed engine accelerations. BAC Flight No. 19 on August 17, 1990, also included several touch-and-go landings, which evaluated airplane handling. Another commenter states that there is a discrepancy in the target Ng engine speeds between various Flight No. 19 test conditions. In particular, the commenter questions the variation in Ng values encountered in a series of touch-and-go landings, and those reported by BAC during Conditions 3 and 4, which were conducted in stabilized level flight conditions. The FAA has reviewed the test procedures and test results related to this comment. Flight No. 19 Conditions 3 and 4 allowed Ng to stabilize at the idle value of 51% Ng. The touch-and-go tests were conducted as a variation to the BAC Configuration 6 test procedures. Configuration 6 required a go-around procedure, initiated from 50 feet above the runway. Initial tests showed this to be an unacceptably dangerous procedure. Consequently, the FAA concurred with the BAC recommendation to alter the procedure to a touch-and-go test. For these tests, the airplane was landed in a normal manner with the condition levers at the low idle positions. After touchdown, the power control levers were moved to the idle positions, the flaps were retracted and the airplane retrimmed for takeoff. At that time, both power control levers were rapidly advanced to full power positions. The test site runway length precluded permitting the engines to decelerate fully to the idle 51% Ng speeds. Three tests were conducted, and the minimum recorded Ng values were 60%, 57%, and 54%,

during the engine deceleration on the ground, and prior to throttle burst to full power and takeoff. The Condition 3 and 4 tests were conducted in an entirely different manner and for the purpose of collecting entirely different data than the modified Configuration 6 tests. Another commenter states that the final phase BAC tests were conducted without known FCU calibrations. The FAA disagrees. The FCU calibrations for the final phase BAC tests were forwarded to the FAA. The FAA has reviewed the FCU calibration reports and has determined that the FCU's were calibrated prior to the final phase BAC tests and that the FCU calibrations were within approved limits.

Another commenter states that BAC Flight No. 19 was invalid due to only one engine having a P3 filter installed. The FAA disagrees. There are no airplane or engine manual restrictions requiring that both engines be configurated the same relative to P3 filter installation. Since individual engine change-outs do occur on BAC models affected by this AD, it is reasonable to expect that some airplanes may be configured with only one engine having a P3 filter installed. The FAA is aware of at least one airplane affected by this AD that had incorporated the PWC P3 filter on only one engine. The commenter also states that no baseline testing exists for either engine, and surmises that the long acceleration times for the P3 filter equipped engine could only be due to an engine problem. The FAA disagrees. BAC Flight No. 19 was conducted using the same airplane and engines as was used for all of the BAC final phase tests. Therefore, baseline test data with and without P3 filters exists for both engines. Engine operation during BAC Flight No. 19 was very similar to the previous test flights, with the P3 filter configured engine demonstrating increased acceleration time consistent with those encountered in the previous tests. The engine not equipped with a P3 filter also performed very similarly to

previous baseline flight tests. No unusual engine anomalies were noted during BAC Flight No. 19, other than the effect of having a P3 filter installed.

Several comments address the effect of a P3 filter on engine acceleration. Five commenters state that the installation of a P3 filter has no effect on engine acceleration. One commenter also states that generator load and ambient temperature are the only significant factors in the BAC engine acceleration tests. One commenter states that P3 filter installation can have a negative effect on engine acceleration, as shown by the final phase BAC tests. The FAA has determined by test that under certain combinations of ambient temperature, bleed air, horsepower extraction, and power setting, engine acceleration time can be negatively affected by P3 filter installation. One commenter suggests that the FAA should not rely on engine acceleration times alone in evaluating the effect of P3 filter installation. The FAA agrees. The primary criteria for acceptable engine acceleration is airplane handling during a balked landing maneuver, not a timed engine acceleration. One commenter states that Piper Aircraft Corporation (PAC) airplanes equipped with P3 filters have not experienced engine acceleration service problems as identified by the BAC tests. The FAA disagrees. The FAA does have records of PAC PWC PT6A powered airplanes that have had acceleration problems due to clogged P3 filters. However, there are no service problems on record indicating engine acceleration problems due to clean (unclogged) installed P3 filters.

Two commenters state that the P3 filter is effective in collecting pneumatic contamination. The FAA agrees that the P3 filter does perform its intended function of collecting pneumatic particle contaminants. One commenter also states that a clogged filter will manifest itself with slow accelerations or no-starts. The FAA agrees. The FAA is aware of engine no-starts, minimum-flow on start-up, slow accelerations and no accelerations with

concurrent high inter-turbine temperature, and roll-backs to minimum-flow occurring due to clogged P3 filters. However, as stated earlier, there are no service difficulty records indicating a safety problem for PWC PT6A engines not equipped with P3 filters. The FAA has reviewed available sources of information, and can find no pattern of engine failures or power losses in service due to FCU pneumatic contamination for PWC PT6A engines not equipped with P3 filters. Lastly, the PWC PT6A FCU failure modes and effects due to pneumatic contamination are identical with or without a P3 filter.

One commenter states that additional BAC tests (Model A100) showed a left to right engine acceleration time difference of 2 seconds, with or without P3 filters installed, and questions why a 2 second difference is acceptable for A100 models. The FAA evaluation criteria for both tests was airplane handling performance during balked landing maneuvers, and not left to right engine acceleration time differentials. The supplemental BAC A100 tests were designed to fully evaluate airplane balked landing performance on a high minimum idle configuration (63% Ng range), with and without P3 filters installed. The FAA has determined that the effect of P3 filter installation on these installations is significantly less than on lower idle installations (51% Ng range), and that A100 handling during the balked landing maneuvers was acceptable. During the supplemental A100 tests, the maximum engine acceleration time increase due to P3 filter installation was 1.98 seconds, while the left to right engine acceleration time differential increased 0.84 seconds. During the final phase BAC Model C90 tests, which are the basis for this AD, the maximum engine acceleration time increase due to P3 filter installation was 25.04 seconds, while the maximum left to right engine acceleration time differential increased 14.99 seconds. The FAA evaluation criteria for both tests was airplane handling performance

during balked landing maneuvers, as affected by increased engine acceleration time due to P3 filter installation. The FAA did not evaluate either airplane by a timed engine acceleration alone, nor solely by left to right engine acceleration time differentials.

One commenter questions why results from the initial phase of the BAC tests were not also considered in the AD action. They were not considered because the initial phase of BAC tests were conducted without benefit of a type design P3 system configuration and known FCU calibration. Post-test inspection found the P3 system to be not in conformity with approved type design, and the FCU calibration to be in error. No definitive results were obtained from these tests for the above reason. This AD action is based on the final phase BAC tests that incorporated a worst case approved engine configuration relative to engine acceleration. All BAC final phase tests were fully coordinated with the FAA, and the FAA was invited to participate in all tests.

Several comments discuss the possibility of exploring methods by which a P3 filter may remain as a installed option. In particular, the commenters suggest either a redesign of the filter, or modification of certain engine operating limits so as to yield acceptable engine/airplane performance. As discussed earlier, no safety issues have been identified that would require that an AD be issued to require P3 filter installation, therefore the FAA cannot mandate that the manufacturers change either the filter design or associated operating limits. However, the AD process does provide a method by which an alternate means of compliance to AD requirements can be approved by the FAA. This method is available to any affected person. One comment suggests that an installed engine acceleration check would be sufficient to establish acceptable airplane performance. The FAA disagrees. FAA type design requirements are such that acceptable engine/airplane performance is required for the worse case certified

configuration. Also, allowing an individual installed engine acceleration check does not account for engine or FCU deterioration or change out. One commenter states that BAC did not investigate engine acceleration performance at the maximum certified minimum idle value of 53% Ng. The comment is accurate. However, the tested configuration of the final phase BAC tests represents the worst case relative to engine acceleration. The BAC final phase tests were not intended to develop alternatives, but to investigate a potentially unsafe condition. One commenter questions what consideration has been given to the original intent to the PWC P3 filter option. The FAA has considered the original intent of the P3 filter option. The P3 filter is a method of dealing with atmospheric contamination, which can cause wear within the FCU. The P3 filter can, under certain conditions, reduce the expense of maintaining the FCU in an airworthy condition. It must also be noted that engine failure modes and operational effects are identical with or without a P3 filter installed. Also, as previously discussed, no safety issues have been identified which would require that P3 filters be mandated. However, relative to the original intent of the PWC P3 filter option, the FAA has coordinated with PWC to define a test program that may identify an engine configuration allowing P3 filters to remain as an option. This AD will be amended to include a P3 filter installation option if it is developed.

One commenter states that use of the engine inlet inertial separator can have a significant affect on engine acceleration characteristics. The FAA disagrees. The inertial separator is a device which promotes the bypass of airborne debris (ice, rain, hail, etc.) away from the engine inlet. The inertial separator does not significantly affect engine inlet airflow parameters. The type design approval by Transport Canada requires that PWC PT6A engines demonstrate fully acceptable operating characteristics with and without the inertial separator extended. Design requirements for the airframe portion of

the engine inlet system are found in the applicable Installation Manual. The final phase BAC tests were conducted with the inerital separator retracted. The FAA does not concur that use of the inertial separator has a significant effect on engine acceleration characteristics.

One commenter questions whether the FAA has considered the increased maintenance cost associated with P3 filter removal. The FAA has determined that the fleet potential for increased FCU maintenance cost is believed to be minimal, primarily due to the low rate of installation of P3 filters in service, which is estimated to be less than 5% of the fleet.

One commenter states that if the BAC tests are valid, then the airplane is improperly certificated if it is unable to perform the balked landing maneuver, and should be grounded by emergency AD. The FAA disagrees. The FAA has determined that the affected aircraft were probably certificated with the P3 filter available as an engine option. The BAC tests are valid in that they establish that an unsafe condition under special operating conditions has developed due to the installation of the P3 filter. To date the only actual service problems identified with P3 filters on PWC PT6A engines are no-starts, minimum-flow on start-up, slow accelerations and no accelerations with concurrent high interturbine temperature, and rollbacks to minimum flow, all due to clogged P3 filters. Therefore, the FAA has determined that the proposed action is appropriate.

Two comments address pending class action litigation concerning P3 filter installation on certain PWC PT6A powered airplanes. The commenters suggest that the FAA should consider this pending civil action relative to this AD. The FAA is taking this action in response to the findings of an unsafe conditions. Further action may be taken if circumstances warrant.

After careful review of the available data, including the comments noted above, the FAA has determined

that air safety and the public interest require the adoption of the rule as proposed, with the following change to the economic evaluation.

The FAA estimates that there are approximately 4,330 PWC PT6A series engines installed on aircraft of U.S. registry, and that approximately 225 engines have a P3 filter installed. The FAA estimates that for those 225 engines with a P3 filter installed it will take approximately 4 work hours to remove the filter at $55 per work hour. The FAA estimates also that there will be no part cost associated with this AD. Based on these figures, it is estimated that the total cost impact of this AD will be $49,500. Pratt & Whitney Canada has advised the FAA that they may assume any parts and labor costs to remove the subject filter assemblies from affected engines. Consequently, there should be minimal cost impact on U.S. operators for parts or labor.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

92-15-11 Pratt & Whitney Canada: Amendment 39-8305; Docket No. 91-ANE-06.

Applicability: Pratt & Whitney Canada (PWC) PT6A-6, PT6A-6/C20, PT6A-20, PT6A-20A, PT6A-21, PT6A-27, PT6A-28, PT6A-34, PT6A-348 and PT6A-36 turboprop engines installed on Beech Aircraft Corporation Models 65-A90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-90-A4, 99, 100, 99A, B90, C90, C90A, E90, H90, A99, A99A, B99, and C99 aircraft.

Compliance: Required within the next 180 days after the effective date of this AD, unless accomplished previously.

To prevent excessive engine acceleration time that could result in an aircraft's inability to safely perform the balked landing maneuver required by Federal Aviation Regulations (FAR) part 23, paragraphs 23.75(d), 23.77 and 23.143(a)(5), accomplish the following:

(a) Perform a visual inspection to determine if a compressor delivery air line (P3) filter assembly has been installed on the engine.

Note: The compressor delivery air line assembly may have been installed on the engine as original equipment, or may have been installed per any of the following PWC Service Bulletins: 1205, 1253, 1290, 1294, 1330, 1343, or 1378.

(b) Remove from service, if installed, the P3 filter assembly.

Note: The engine compressor delivery air line assembly can be returned to an approved configuration without a P3 filter. For information, refer to the applicable PWC Maintenance Manual and Parts Catalog.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office, FAA, Engine and Propeller Directorate. The request should be forwarded through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note; Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained for the Engine Certification Office.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) This amendment becomes effective on August 17, 1992. Issued in Burlington, Massachusetts, on June 29, 1992.

Jay J. Pardee,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

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